No. 346463

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SERGIO HERRERA

Appellant,

v.

SANDRA VILLANEDA

Respondent.

APPEAL FROM BENTON COUNTY SUPERIOR COURT
THE HONORABLE BRUCE SPANNER

BRIEF OF RESPONDENT AND MOTION REQUESTING DETERMINATION THAT THE SUBJECT APPEAL IS MOOT

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I. MOTION PURSUANT TO RAP 10.4(d)

Mr. Herrera's failure, during the pendency of this appeal, to seek a timely stay of the Oregon proceedings which he participated-in with the assistance of his Oregon counsel, knowing those proceedings would result in the entry of a final parenting plan regarding IH and EH in the State of Oregon, renders this appeal moot (as previously argued by counsel for Mrs. Villaneda in Respondent's Memorandum in Response to Appellant's Motion for Stay filed in this Court on October 24, 2016).

The basis for this motion has been previously advanced in this Court during this appeal in Respondent's Memorandum in Response to Motion to Stay filed on October 24, 2016. For brevity purposes, the Memorandum is attached in appendix form (See Appendix 1, attached hereto).

II. INTRODUCTION

In the event this Court does not grant Respondent's motion advanced above, Benton County Superior Court Judge Bruce R. Spanner did not abuse his discretion, on revision, when he affirmed Commissioner Joseph Schneider's Order to Decline Jurisdiction in favor of the State of Oregon.

III. STATEMENT OF THE CASE

On May 27, 2006 I.H. was born (CP 226).

On March 2, 2007 a Judgment and Order Determining Parentage and Granting Additional Relief was filed in Benton County Superior Court (CP 234). That Judgment, indicated, among other things, as follows: "The

primary residence of the child shall be with the mother who is designated custodian solely for the purpose of other state and federal statutes. Sandra Villaneda shall be the designated custodian of the child, and the child shall reside with the mother at all times." (CP 236).

Between March 2, 2007 and March 23, 2015, no litigation occurred in Benton County or in any other county in Washington (CP 227).

On November, 2011, the parties married in the State of Washington (CP 66).

In mid-2013, while still married, Ms. Villaneda and Mr. Herrera initiated plans to relocate to the State of Oregon (CP 66). Ms. Villaneda did so with the minor child, I.H., relocating to Hillsboro, Oregon, where she resides today (CP 66). After doing so, Mr. Herrera traveled to Oregon on a number of occasions to see Ms. Villaneda, visit with his son, I.H., and to look for a place to live with her (CP 523-524).

Ms. Villaneda and I.H. have resided in Hillsboro, Oregon ever since relocating in mid-2013 (CP 389).

The decision that both parties intended to relocate is reflected, in part, in text messages between Ms. Villaneda and Mr. Herrera (CP 528-532).

After Ms. Villaneda relocated, Mr. Herrera stepped in-and-out of her life and that of I.H. and failed to support them (CP 524).

On April 29, 2014, Mrs. Villaneda gave birth to E.H., the parties' daughter, in Kennewick, Washington, and returned to Hillsboro, Oregon where she resided (CP 395).

As a result of Mr. Herrera's unwillingness to provide financial support for Mrs. Villaneda, she sought child support through DSHS administratively for both I.H. AND E.H. (CP 17). Mr. Herrera participated in those administrative proceedings knowing child support was sought for both children and child support was administratively established for both children on or about June 10, 2014 (CP 17).

In December, 2014, with no effort by Petitioner to follow-through with a relocation to Oregon, Respondent filed for a legal separation in Washington County, Oregon (CP 73). Ultimately, in the Oregon proceeding, a Washington County Superior Court ordered visitation between Mr. Herrera and the parties' son, IH (a copy of the Supplemental Judgment Regarding Custody and Parenting Time was provided to this Court on October 31, 2016, at the request of Commissioner Wasson).

On February 17, 2015, Mr. Herrera filed a Response in the Oregon proceeding and did not admit paternity of E.H., and in a Declaration filed on August 6, 2015 in Benton County Superior Court, did the same ("The DNA testing for EH is still in process; therefore the Court should not base a decision to decline jurisdiction on whether a visitation schedule is later established for EH, who may or may not be my daughter. She was

conceived after our separation, when Sandra was seeing other men.")(CP 257).

Mr. Herrera submitted to paternity testing in the State of Oregon and those results established he was EH's father (CP 117).

On March 24, 2015, 3-4 months after Ms. Villaneda commenced the action in Oregon, Mr. Herrera then filed an action in Benton County Superior Court contending that Washington was the home state of the minor child, I.H., even though I.H. had resided in Hillsboro, Oregon since mid-2013 (CP 3).

Ms. Villaneda, represented by prior counsel, filed a Motion to Dismiss which was denied by Commissioner Joseph Schneider (CP 32).

On August 13, 2015, Ms. Villaneda, through prior counsel, argued a second motion requesting the Benton County Superior Court decline its jurisdiction and that motion was denied orally on that date. Approximately 4 months later, on December 1, 2015, Ms. Villaneda through her present counsel, appeared in Benton County Superior Court and the written order stemming from the August, 2016 hearing was entered, initially denying mother's motion for Washington to Decline Jurisdiction (CP 125). During the presentation of that Order, Commissioner Schneider pointed-out to Mr. Herrera's attorney that he was revising the order to include language that Mr. Herrera had previously denied his paternity and interlineated that language in the Order (CP 127).

On December 8, 2015, Ms. Villaneda filed a Motion for Reconsideration and/or in the alternative for the court to decline jurisdiction (CP 536). Commissioner Schneider denied the motion for reconsideration but agreed to consider the request to decline jurisdiction in his decision (CP 129).

On January 12, 2016, Mr. Villaneda filed a Motion for Order to Decline Jurisdiction Pursuant to RCW 26.27.261 (CP 139). On January 29, 2016, the matter was argued before Commissioner Schneider and he agreed that Washington should now decline its jurisdiction (CP 296).

On February 2, 2016, an order was entered in which Washington declined its jurisdiction (CP 185).

On February 16, 2016, Mr. Herrera filed a Motion for Revision. The Revision Judge, Judge Bruce R. Spanner, then advised Mr. Herrera's counsel, that he need the transcript from the January 29, 2016, hearing to assist him in considering the Motion for Revision (CP 223, 282).

After two months, and the transcript being provided to Judge Spanner, he issued a letter ruling articulating his decision and the rationale for declining jurisdiction in favor of Oregon (CP 300)[1]

On August 11, 2016, a Notice of Appeal was filed by Mr. Herrera in this matter which sought review of the July 13, 2016 Amended Order Declining Jurisdiction Pursuant to RCW 26.27.261 and Denying Motion for Revision.

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[1] Judge Spanner incorrectly referred to IH, rather than EH, in his letter decision dated April 7, 2016, as IH's paternity had been previously determined.

Since prior to August 2016, Mr. Herrera, through his own election, has not exercised visitation with either of his children (as previously argued by counsel for Mrs. Villaneda in Respondent's Motion to Extend Time for Filing the Brief of the Respondent filed in this Court on June 7, 2017, see Appendix 2).

IV. LAW

A superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and the issues presented to the commissioner. Marriage of Moody, 137 Wash. 2d 979, 992-993, 976 P.2d 1240 (1999).

A trial court's decision regarding inconvenient forum is discretionary. In re Marriage of Greenlaw, 123 Wash. 2d 593, 609, 869 P.2d 1024 (1994). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id. at 609.

V. ARGUMENT

A. MR. HERRERA'S ASSIGNMENT OF ERROR NO. 4 SHOULD BE DISREGARDED BY THIS COURT.

Mr. Herrera set forth six assignments of error and Assignment of Error No. 4 contends Commissioner Joseph Schneider erred in a finding he made in the December, 2015 Order.

An appeal from a Superior Court Judge's decision on revision confines this Court's review to the decision of the superior court judge, not the commissioner. Lyle v. Lyle, p. 5 No. 33971-8-III (July 11, 2017) (citing,

State v. Ramer, 151 Wash. 2d 106, 113, 86 P.3d 132 (2004) (emphasis added)); (See also, State v. Wicker, 105 Wash. App. 428, 433, 20 P. 3d 1007 (2001, Div. I), "On appeal this Court's review is far more deferential to the commissioner's ruling. Moreover, once the judge makes a decision on revision, it is the judge's decision, not the commissioner's.").

The case law is clear, particularly this Court's very recent decision in Lyle, Id., that Mr. Herrera is precluded from seeking review of Commissioner Schneider's decision and/or Order.

B. MR. HERRERA ADVANCES SEVERAL LEGAL ARGUMENTS FOR THE FIRST TIME ON APPEAL WHICH IS IMPERMISSIBLE AND, ACCORDINGLY THIS COURT SHOULD REFUSE TO REVIEW THOSE NEW ARGUMENTS.

This appeal is an appeal from the Amended Order to Decline Jurisdiction signed by Benton County Superior Court Judge Bruce Spanner who, as the revision judge, engaged in a de novo review of the decision by a commissioner to decline jurisdiction in favor of Oregon (See Notice of Appeal). Mr. Herrera disagreed with that commissioner's decision and advanced in his 23 page Motion for Revision, filed on February 12, 2016, 5 legal arguments as to why the commissioner's decision to decline jurisdiction in favor of Oregon was in error (CP 200-222).

The following is a recitation of the arguments by Mr. Herrera in his Motion for Revision to highlight, clearly, that he now attempts to advance new legal arguments/theories in this appeal (CP 200-222):

1. "Washington State Has Continuing and Exclusive Jurisdiction Over Ian Herrera For All Custody

Determinations, Affirmed by Commissioner Schneider's Three Prior Orders Denying to Decline Wa Jurisdiction." (CP 212).

At the conclusion of that argument, Mr. Herrera indicated as follows:

> "[m]other's fourth motion to decline contravenes the underlying tenets of the UCCJEA to avoid forum shopping and ensure stability and consistency in the child's life. Therefore simply because mother moved to Oregon does not support any consideration of WA to decline its jurisdiction as an inconvenient forum in favor of Oregon, where father continues to reside in Washington and the child has significant continuing contacts in Washington." (CP 216).

2. ***"Washington State Has Continuing Jurisdiction to Establish a Residential Parenting Schedule With The Original Order Determining Parentage Which Awarded Primary Residential Placement to the Mother; The Oregon Petition for Dissolution/Separation Is Antithetical to the Wa State Parentage Action" (CP 216).***

Mr. Herrera argues that it does not make sense for Ms. Villaneda to seek to have Washington decline jurisdiction because all Mr. Herrera is seeking is visitation with IH (CP 217).

3. ***"The Mother's Oregon Petition for Separation Is Tantamount to "Forum Shopping" That The UCCJEA Specifically Was Enacted to Prevent" (CP 217).***

Within this argument on revision, Mr. Herrera 'throws in the kitchen sink' and advances the following arguments: (a) Mother made misrepresentations or omissions to the Oregon court regarding the prior Washington Judgment/Order Determining Parentage (CP 218 and 219), (b) The Oregon action is a dissolution action and IH was not a child born of the marriage (CP 219), (c) There is no correlation with the proceedings pending

in Oregon (CP 219), (d) There can be no 'convenient forum' at issue where there is not parentage action pending in Oregon to address IH's custody issues (CP 219), (e) Transferring jurisdiction will require the parties to start all over again resulting in waste of time and resources (CP 219), (f) Mother wants Oregon to take the case so she can restrict father's time (CP 219), (g) "morphing" father's petition for a residential schedule into a dissolution/legal separation proceeding is "procedurally offensive" (CP 219), (h) The Commissioner's decision to decline jurisdiction leaves IH's custody and visitation with father uncertain (CP 219 and 220) and (9) The Commissioner's prior three decisions denying the request to decline jurisdiction should be binding on the parties and "the fourth decision granting to decline is not supported by substantial evidence and constitutes an abuse of discretion." (CP 220).

4. "The DNA Test Results Are Irrelevant to Wa State's Continuing and Exclusive Jurisdiction Over Ian's Custody Determinations."

The arguments advanced here by Mr. Herrera on revision were: (a) The claim that the August, 2015 ruling was irrelevant to the Commissioner's decision (CP 220), (b) Having two parenting plans in two jurisdictions was acceptable to the Commissioner, (c) Commissioner Schneider's August ruling was clear that Washington was not declining jurisdiction, (d) EH's paternity was never at issue in the action to establish a residential schedule involving IH and the DNA test results were insufficient to warrant the Commissioner's reversal of his prior three

decisions to deny declining Washington state jurisdiction as an inconvenient forum to Oregon (CP 220), (e) If the DNA test results were pivotal, Ms. Villaneda would have jumped at the chance to file a motion to earlier to decline jurisdiction when she received the DNA results and/or the Court would have done the same; and (f) The fact that neither Ms. Villaneda nor the Court did anything when receiving the DNA results is an indication that it had no bearing on the Commissioner's third decision to deny to decline jurisdiction.

5. ***"The Commissioner's Decision to Grant Declining Washington's Jurisdiction Results in a Substantial Detriment, Loss and Waste of Judicial and Parties' Financial Resources, Time and Effort That Has Been Spent in the Past 11 Months Pursuing This Litigation in Reliance On the Prior Decisions Of the Commissioner Denying To Decline Wa Jurisdiction" (CP 221).***

Here, Mr. Herrera argues that the parties should be entitled to rely on the Commissioner's August ruling, it would be a waste of the Court's and parties' resources to transfer the case to Oregon, it would be a waste for the Oregon court to use its resources, matters would be delayed, the Commissioner's decision lacks a transition plan, Washington has a case schedule order in place, dates would be extended and if Washington kept the case, it would be concluded before Oregon could do so (CP 221).

At no time did Mr. Herrera in his motion for revision advance the argument that the decision to decline jurisdiction was erroneous or an abuse of discretion because it lacked required findings under each of the criteria under RCW 26.27.261 (Assignment of Error No. 1 in this appeal).

At no time did Mr. Herrera in his motion for revision advance the argument that the decision to decline jurisdiction was erroneous or an abuse of discretion because it failed to consider and apply the Washington Uniform Parentage Act (Assignment of Error No. 2).

At no time did Mr. Herrera in his motion for revision advance the argument that the decision to decline jurisdiction was erroneous or an abuse of discretion because the Court failed to apply the provisions of RCW 26.26 in "characterizing" Sergio's legal relationship with EH as anything other than "Presumed Father."

At no time did Mr. Herrera in his motion for revision advance the argument that the decision to decline jurisdiction was erroneous or an abuse of discretion because it made findings regarding Ian's parentage, witness availability, travel considerations, financial considerations and familiarity with proceedings (Assignment of Error No. 5).

At no time did Mr. Herrera in his motion for revision advance the argument that the decision to decline jurisdiction was erroneous or an abuse of discretion because it made a parentage determination for another child (EH) living in another state over whom Washington had no jurisdiction (Assignment of Error No. 6).

RAP 2.5(a) and the case law in the State of Washington is crystal clear – new arguments, with limited exceptions not applicable here - cannot be advanced for the first time on appeal.

For example, this Court in a decision written by Judge Sweeney, Almquist v. Finley School District No. 53, 114 Wash. App. 395, 57 P.3d 1191 (2002, Div. III), noted, in pertinent part, as follows:

> Simply put, these substantial legal theories advanced on appeal were not urged upon the trial judge in the first instance. We need not entertain them for the first time here. Our approach is well founded and routinely applied. Issues cannot, with only limited exceptions, be raised for the first time on appeal. RAP 2.5(a); Wells v. W. Wash. Growth Mgmt. Hearings Bd.., 100 Wash. App. 657, 681, 997 P.2d 405 (2000). The District argued during the summary judgment proceeding on liability that it was not a manufacturer because the product was frozen meat. The District was then a consumer or, at most, a nonmanufacturing product seller. CP at 903–09. It made no argument that it was not engaged in trade or commerce and that no product therefore came into being. Nor did it argue that it was exempt from liability as a professional services provider. CP at 903–09; CP at 438–41.

Id. at 401 & 402 (emphasis added).

This Court should refuse to review the six assignments of error based on RAP 2.5(a) and the case law in the State of Washington.

C. IF THIS COURT IS WILLING TO CONSIDER THESE NEW LEGAL ARGUMENTS, IN RESPONSE TO APPELLANT'S ASSIGNMENT OF ERRORS NUMBERED 1, 5 AND 6, COMMISSIONER SCHNEIDER IN HIS ORAL DECISION AND JUDGE SPANNER IN HIS WRITTEN LETTER RULING PROPERLY CONSIDERED THE STATUTORY FACTORS, AND OTHER FACTORS, IN DECLINING JURISDICTION IN FAVOR OF OREGON AND DOING SO WAS NOT AN ABUSE OF DISCRETION.

RCW 26.27 et seq comprise the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Under RCW 26. 27.261, 'Jurisdiction', RCW 26. 27.261(2) provides as follows:

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction **at any time** if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall **consider** whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, **including**:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition the court considers just and proper.

> (4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for dissolution or another proceeding while still retaining jurisdiction over the dissolution or other proceeding.

(emphasis added).

As the statute plainly indicates, a Court may decline jurisdiction "at any time" and it "shall allow the parties to submit information and shall consider all relevant factors, including (a)-(h).

A plain reading of the statute makes it clear that: (1) there is no verbiage within it requiring a Court to make findings on each of the factors – the Court is to simply 'consider' those factors, which is what Commissioner Schneider did and Judge Bruce Spanner did (CP 125; CP 283-297; CP 300-311);[2] (2) the list of factors identified is not exhaustive – the Court has the discretion to consider others (i.e. "[s]hall consider all relevant factors, including..."); and (3) RCW 26.27.261(2) does not preclude a Court, in considering the information provided, from giving any one factor more weight than any other factor.

In this instance, Commissioner Schneider considered Mr. Herrera's denial of paternity of E.H. when the three prior motions to decline jurisdiction were advanced before him and then properly considered the

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[2] Moreover, a revision denial constitutes an adoption of the commissioner's decision and the court is not required to enter separate findings and conclusions. In re Dependency of B.S.S., 56 Wash. App. 169, 171, 782 P.2d 1100 (1989). The commissioner's oral findings adopted by the revision court are sufficient for review (emphasis added). Williams v. Williams, 152 Wash. App. 22, 232 P.3d 573 (2010, Div. III).

results of the paternity test verifying that Mr. Herrera was the biological father of EH (CP 283-297; and CP 300-311). He also considered other factors, which he was entitled to do given the language of the statute – witness availability, expense to the parties of maintaining two action in two different states, economies of scale, and timeliness of the Oregon action moving forward (CP 295-296).

Judge Spanner did the same (CP 300-301). Like Commissioner Schneider, Judge Spanner properly considered witness availability, financial circumstances to the parties of maintaining two separate proceedings, and the benefit of having one court addressing the relevant facts and circumstances and formulating and coordinating complimentary visitation.

In sum, Appellant's first, fifth and sixth assignment of errors have no basis.

D. AT THE TRIAL COURT, MR. HERRERA DID NOT ADVANCE A LEGAL ARGUMENT THAT THE COMMISSIONER AND/OR JUDGE SPANNER, ON REVISION, SHOULD CONSIDER AND APPLY THE UNIFORM PARENTAGE ACT (RCW 26.26 et seq) AND BEYOND REFERENCE TO IT IN ASSIGNMENTS OF ERROR NO. 2 AND NO. 3, THERE DOES NOT APPEAR TO BE A CLEAR ARGUMENT IN APPELLANT'S BRIEF IN SUPPORT OF SUCH CLAIM.

It is difficult to make sense of this legal argument or theory advanced by Mr. Herrera because beyond mere reference to it in Assignment of Error No. 2 and No. 3, it is difficult to locate the actual argument in Appellant's Brief asserting a legal basis in support of such

argument.[3] With that said, Respondent, in attempting to make sense of Assignments of Error 2 and 3, has responded herein to both as they appear to be the same arguments or inter-related.

The best guess at Mr. Herrera's argument is that the genetic test results showing Mr. Herrera as the biological father of EH in August, 2015 were meaningless and should not have been a consideration in ultimately deciding to decline jurisdiction because the UPA determined he was the 'presumed father' of her all along. If that is the argument, then where is the authority or precedent by Mr. Herrera that precluded either judicial officer from giving more weight to an actual genetic test produced at a later point in time? Where is the precedent that explains to this Court how Judge Spanner's decision to decline jurisdiction in considering that genetic test was 'manifestly unreasonable' or based on "untenable grounds or reasons"? No such authority has been provided to this Court to advance these baseless arguments.

As indicated in the footnote below, Mr. Herrera appears to attempt to 'make a lot of hay' about his status as a 'presumed father', when he technically is and has been an 'acknowledged father' as defined by the statute (RCW 26.26.011(1)); however, his status as one or the other is irrelevant. Commissioner Schneider, initially, was faced with a person - Mr. Herrera - who was cagey about his paternity of EH during the initial

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[3] Mr. Herrera contends on p. 43 that he was identified on EH's birth certificate as her father at birth – if so, he would not be, by definition, a 'presumed father' as Mr. Herrera argues, he would be an 'acknowledged father' under RCW 26.26.011 and RCW 26.26.300.

efforts by Ms. Villaneda to decline jurisdiction and when that 'picture' became clearer later on, Commissioner Schneider and Judge Spanner had the discretion 'to consider' that, among other facts, in declining jurisdiction in favor of Oregon. Keep in mind that Commissioner Schneider at the hearing on August 13, 2015 (CP 304-310) and in the December, 2015 Order previously considered the other factors set forth in RCW 26. 27.261 (CP 125-128).

The UCCJEA, specifically RCW 26.27.261, does not restrict a Court's consideration to a finite list of factors - the use of 'including' permits consideration, in this instance, of other things, like the fact that a child (EH, in this instance) of the parties resides in another state (Oregon), a genetic test confirms Mr. Herrera is the father (and he files nothing to contradict that in Washington) and a legal separation/dissolution proceeding was pending in Oregon where a parenting plan would need to be entered.

E. THE COURT ORDER PREPARED BY MR. HERRERA'S COUNSEL AND PRESENTED TO COMMISSIONER SCHNEIDER IN DECEMBER, 2015 IS NOT BEFORE THIS COURT ON APPEAL (ASSIGNMENT OF ERROR NO. 4)

An appeal from a Superior Court Judge's decision on revision confines this Court's review to the decision of the superior court judge, not the commissioner. Lyle v. Lyle, p. 5 No. 33971-8-III (July 11, 2017) (citing, State v. Ramer, 151 Wash. 2d 106, 113, 86 P.3d 132 (2004) (emphasis added)); (See also, State v. Wicker, 105 Wash. App. 428, 433, 20 P. 3d 1007 (2001, Div. I), "On appeal this Court's review is far more deferential to the

commissioner's ruling. Moreover, once the judge makes a decision on revision, it is the judge's decision, not the commissioner's.").

VI. ATTORNEY'S FEES

Mr. Herrera's request for attorney's fees should be denied due to this appeal being moot and frivolous.

As a single mother of two children, Respondent did not/does not have the financial wherewithal to endure the fees and costs associated with this appeal and has 'robbed Peter to pay Paul' to figure out a way to defend it, and should not be required to continue her "juggling act" to pay the Appellant's attorney's fees on top of it.

In addition to her financial circumstances, this appeal is not only moot but is frivolous. As noted in Advocates for Responsible Development v. Western Washington Growth Management Hearings Board, 170 Wash. 2d 577, 245 P.3d 764 (2010):

> RAP 18.9(a) permits an appellate court to award a party attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. *Reid v. Dalton,* 124 Wash.App. 113, 128, 100 P.3d 349 (2004). An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Tiffany Family Trust Corp. v. City of Kent,* 155 Wash.2d 225, 241, 119 P.3d 325 (2005). All doubts as to whether the appeal is frivolous should be resolved in favor of the appellant. *Id.*

Appellant's brief seeks reversal of a Commissioner's decision, which is not permissible on appeal.

Appellant's brief advances new legal arguments which is also not permissible and to make matters worse, those arguments first advanced in his assignments of error, appear to lack clear substantive argument and/or precedent to support the argument.

This appeal presents no debatable issues upon which reasonable minds might differ.

The UCCJEA, specifically, RCW 26.27.261(1) permits a trial court to, at any time, determine that Washington is an inconvenient forum in favor of a different state. The statute indicates a list of factors that should be 'considered' and leaves it to a Court to consider other factors if it so chooses in arriving at the decision to decline jurisdiction. That is exactly what happened here.

VII. CONCLUSION

This Court should deem the substance of this appeal moot and grant Respondent's motion to terminate review.

If this Court declines that invitation, it should affirm Judge Bruce Spanner's decision, on revision, to decline jurisdiction in favor of Oregon.

DATED this 16th day of August, 2017.

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD, LLP

By: _____

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VIII. APPENDIX

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SERGIO HERRERA

Appellant,

v.

SANDRA VILLANEDA

Respondent.

APPEAL FROM BENTON COUNTY SUPERIOR COURT
THE HONORABLE BRUCE SPANNER

RESPONDENT'S MEMORANDUM IN RESPONSE TO MOTION TO STAY TRIAL COURT ORDER AND MOTION TO TERMINATE APPEAL PURSUANT TO RAP 17.4(d)

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I. INTRODUCTION

COMES NOW, the Respondent, SANDRA VILLANEDA, and submits this Memorandum in Response to Motion for Order to Stay Amended Order filed by Mr. Herrera on October 11, 2016, and requests that this Court deny that Motion, and, separately, moves this Court to terminate this appeal.

II. STATEMENT OF THE CASE

1. Mr. Herrera filed a Motion to Stay in the Benton County Superior Court on August 26, 2016, and that matter was heard on September 2, 2016, by The Honorable Bruce Spanner. Judge Spanner entered an Order properly denying that motion (See Exhibit 1).
2. Mr. Herrera waited five weeks and then filed the present Motion to Stay on October 11, 2016 seeking, in effect, the same relief he already sought and was denied in Benton County Superior Court.

   What's more, Mr. Herrera filed this present Motion knowing that important matters were proceeding in the State of Oregon on October 6, 2016 and, indeed, did occur.
3. On October 6, 2016, Ms. Villaneda appeared in Washington Circuit Court with her Oregon attorney, Ken McNeil, and Mr. Herrera's attorney appeared on Mr. Herrera's behalf. On that date, Judge Donald R. Letourneau found that Oregon had jurisdiction to proceed and entered a Temporary Order (See Exhibit 1).
4. After that hearing, negotiations between counsel in Oregon have occurred in the direction of entering a final judgment that pertains to Ian and it is expected that matter will be finalized on the next scheduled court date of October 25, 2016.

III. LEGAL ARGUMENT

A. THIS APPEAL IS MOOT (INCLUDING THE ANCILLARY PROCEEDINGS PENDING BEFORE THIS COURT, INCLUDING MR. HERRERA'S MOTION TO VACATE, DISCRETIONARY REVIEW, AND NOW MOTION FOR A STAY) AND THIS COURT SHOULD, THEREFORE, DENY THIS MOTION.[1]

Mr. Herrera has been well aware for many weeks that the State of Oregon was proceeding on October 6, 2016 to make decisions regarding Ian.

Mr. Herrera's first effort at a 'stay' failed at the trial court level on September 2, 2016, and then, knowing October 6, 2016 was a very important date, Mr. Herrera then waited until October 11, 2016, to file this Motion, AFTER Judge Donald Letourneau and the State of Oregon had already proceeded in Washington County Superior Court (See Exhibit 1).

As reflected in *Norman v. Chelan County Public Health Hospital District No. 1,* 100 Wash. 2d 633, 673 P.2d 189 (1983), our Supreme Court, indicated as follows:

> The rule on whether this court should consider moot questions was set forth in *Sorenson v. Bellingham*, 80 Wash. 2d 547, 558, 496 P.2d 512 (1972):
>
> It is a general rule that, where only moot questions or abstract propositions are involved, or where the substantial questions involved in the trial court no longer exist, the appeal or writ of error, should be dismissed. There is an exception to the above stated

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[1] A case is moot when the court can no longer provide effective relief. *In re Swanson*, 115 Wash. 2d 21, 24, 793 P.2d 962, 804 (1990). Ordinarily, "where only moot questions or abstract propositions are involved, ... the appeal ... should be dismissed." *Sorenson v. Bellingham*, 80 Wash. 2d 547, 558, 496 P.2d 512 (1972). Respondent is filing a separate motion to dismiss and/or terminate this appeal on that basis.

> proposition. The Supreme Court may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and substantial public interest are involved ...[2]

In the instant case, this Court cannot render effective relief at this juncture. Judge Letourneau and the State of Oregon moved forward on October 6, 2016 and are poised to do so, again, on October 25, 2016 on issues that pertain to Ian, including the entry of parenting plan or residential schedule.

B. THERE ARE NO DEBATABLE ISSUES PRESENTED ON APPEAL AS RCW 26. 27.261 PERMITTED THE COMMISIONER THE DISCRETION TO, AT ANY TIME, DETERMINE WASHINGTON WAS NOT A CONVENIENT FORUM.

The effort by Mr. Herrera to 'rehash' the procedural stepping stones that led to the Commissioner determining that Washington was an inconvenient forum does not turn this case into one involving a debatable issue.

The statute involved, RCW 26.27.261, makes it clear that the Commissioner could, at any time, consider the issue of inconvenient forum and that is exactly what happened here.

One of the reasons the Commissioner ultimately decided to decline jurisdiction was because Mr. Herrera would not admit his paternity of

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[2] In this case, the three criteria that determine whether a matter is of continuing and substantial public interest do not exist in this case: (1) the public or private nature of the question presented; (2) the need for a judicial determination for future guidance for public officers, and (3) the likelihood of future recurrences of the issue. *State v Sansone*, 127 Wash. App. 630, 111 P.3d 1251 (2005, Div. I).

Eliana, Ian's younger sister, and, accordingly, a parenting plan action then proceeded in Oregon as it related to Eliana. When it became clear to the Commissioner later-on that Mr. Herrera was, indeed, the biological father of Eliana, he considered that, among other factors, in determining that it made the most sense for Oregon to control the visitation issues pertaining to both children where they were both resident, rather than have two different states make two different decisions regarding parenting plan decisions relative to Ian and Eliana.

C. THE INJURY THAT WOULD BE SUFFERED BY MS. VILLANEDA, AT THIS JUNCTURE, EXCEEDS THAT SUFFERED BY MR. HERRERA.

At this juncture, Ms. Villaneda has proceeded in the State of Oregon and Judge Letourneau has made interim decisions relative to that proceeding, including ones that bear on Ian. She and her son would suffer injury if this Court were now to 'stay' the underlying Order, both financial and emotional.

Had Mr. Herrera taken more timely action in this matter, knowing that Oregon and Judge Letourneau were making decisions relative to Ian, then it might be reasonable to hear him complain that he has suffered injury; however, he and his Washington attorney were well aware of the Oregon hearing date on October 6, 2016, as was his Oregon attorney who appeared at the hearing. Moreover, it is very likely that a day after the submission of this memorandum opposing a 'stay' on October 24, 2016, it is likely Oregon and Judge Letourneau will have already taken additional

procedural steps in addressing visitation between Ian and Mr. Herrera in the State of Oregon.

Mr. Herrera wants visitation with Ian. Mr. Herrera and his attorney in Oregon are addressing his visitation in the State of Oregon – where is the 'injury' to Mr. Herrera?

IV. CONCLUSION

This Court should deny the Motion for a stay. It should do so primarily because the issue on appeal is now moot. Further, it should do so because Mr. Herrera has not satisfied the requirements under RAP 8.1(3).

In addition to denying the Motion for Stay, this Court should grant Respondent's motion to terminate this appeal on the basis that the issue on appeal is now moot.

DATED this 24th day of October, 2016.

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD, LLP

By: _____
EDWARD F. SHEA, JR.
Attorney for Respondent
WSBA 23704

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of October, 2016, I caused to be served a true and correct copy of the foregoing document to the following:

☐ HAND DELIVERY
☒ U.S. MAIL
☐ OVERNIGHT DELIVERY
☐ FACSIMILE
☐ EMAIL

Joanne Comins Rick
Halstead & Comins Rick, PS
1221 Meade Avenue
Prosser, WA 99350

HEATHER MCCLAIN

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF WASHINGTON

Domestic Relations Department

In the Matter of the Marriage of:

SANDRA VILLANEDA,

Petitioner,

and

SERGIO ENRIQUE HERRERA,

Respondent.

Case No.: C14-3910DRD

TEMPORARY POST-JUDGMENT ORDER

THIS MATTER came before the Court on October 6, 2016, upon Petitioner's show cause motion regarding a modification of the parenting plan for the minor child Ian Herrera. Petitioner appeared in person and with attorney Ken W. McNeil of McNeil & Goldstein, LLC. Respondent did not appear, but his attorney, James Zwaanstra of Hillsboro Law Group, P.C., was personally present. The court-appointed attorney for Ian Herrera, Andrew McLain of McLain Legal Services, was personally present. The Court, having reviewed the records, files and hearing memorandum of counsel, and taking testimony and evidence presented, and finding good cause and being fully advised in the premises; now, therefore makes the following FINDINGS OF FACT:

1. Petitioner shall hereinafter be referred to as Mother. Respondent shall hereafter be referred to as Father.

2. Mother and Father are the legal parents of Ian Herrera, age 10.

3. The state of Washington initially established jurisdiction regarding the custody, parenting time and support of and for Ian. The state of Washington has subsequently entered an order declining

McNeil & Goldstein, LLC
1323 NE Orenco Station Pkwy, # 310
Hillsboro, OR 97124
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EXHIBIT 1

jurisdiction but that order is presently on appeal to the Washington State Court of Appeals. Nonetheless, this Court finds it has jurisdiction to resolve matters of custody and parenting time regarding Ian since Ian has resided continuously with Mother in Oregon since 2013.

4. Father was not present for today's hearing and provided no explanation for his absence.

5. The Court desires Father's input on a parenting time plan for Ian.

6. It is unclear if the state of Washington previously awarded joint custody of Ian to both parents or sole custody of Ian to Mother as those terms are defined under Oregon law but provision 4.2 of the Temporary Parenting Plan entered by the State of Washington and entered as Exhibit 101 in this proceeding provides that both parties shall jointly make major decisions in the following areas: education decisions, non-emergency health care, religious upbringing and extra-curricular/sports activities.

NOW, THEREFORE, THE TEMPORARY ORDER OF THE COURT is as follows:

1. Father's parenting time with Ian is suspended until further Order of the Court.

2. Mr. Zwaanstra shall inform the Court via email as soon as possible regarding Father's non-appearance, and shall copy Mr. McNeil and Mr. McLain on said email.

3. Mr. McNeil shall file amended show cause pleadings allowing the Court to award Ian's legal custody to Mother or Father.

4. Today's hearing is continued to October 25, 2016, at 9:00am.

DATED this ____ day of _____, 2016.
Signed: 10/11/2016 04:47 PM

Circuit Court Judge Donald Letourneau
Honorable Donald R. Letourneau
Circuit Court Judge

PREPARED AND SUBMITTED BY:

Ken W. McNeil, OSB # 910772
Attorney for Petitioner/Mother
Email: ken@mcneillawoffice.com

APPROVED BY:

/s/ James Zwaanstra
James Zwaanstra, OSB # 971118
Attorney for Respondent/Father
Email: jamesz@hillsborolawgroup.com

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APPROVED BY:

/s/ Andrew McLain
Andrew McLain, OSB # 064324
Attorney for the Minor Child Ian Herrera
Email: andy@mclainlegal.com

CERTIFICATE OF READINESS

I certify that this proposed Order is ready for judicial signature because:

X Each opposing party affected by this Order has stipulated to or approved the Order, as shown by the signatures on the document being submitted, or by written confirmation sent to me.

☐ I have served a copy of this Order on all parties entitled to service and:

☐ No objection has been served on me within the 7-day timeframe.

☐ I received objections that I could not resolve with the other party despite reasonable efforts to do so. I have filed with the court a copy of the objections I received and indicated which objections remain unresolved.

☐ After conferring about objections, the other party agreed to file any remaining objections with the court.

DATED this 11th day of October, 2016.

Ken W. McNeil, OSB # 91072
ken@mcneillawoffice.com
Attorney for Petitioner/Mother

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Hillsboro, OR 97124
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No. 346463

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SERGIO HERRERA **Petitioner/Appellant,** **and** SANDRA VILLANEDA **Respondent.**	**MOTION TO EXTEND TIME FOR FILING THE BRIEF OF THE RESPONDENT**

1. IDENTITY OF MOVING PARTY

Sandra Villaneda, Respondent, asks for the relief designated in Part 2.

2. STATEMENT OF RELIEF SOUGHT

A 60-90 day extension of time to file Respondent's Brief in Response to Appellant's Brief.

3. FACTS RELEVANT TO MOTION

At present, Respondent's Response Brief is due on June 20, 2017. This due date was moved on a few occasions as a result of delays by Appellant in filing Appellant's brief on time. That delay and rescheduling of the date by which such brief was due then created conflicts in counsel for Respondent's schedule.

At present, counsel for Respondent has a complicated civil case involving business valuations scheduled for trial later this month and multi-day trials scheduled at present to go out on July 12th and July 19th.

Additionally, Counsel for Respondent scheduled a personal family trip in January of this year to be in Europe with his family from July 29 to August 9th.

4. GROUNDS FOR RELIEF AND ARGUMENT

RAP 17(a).

At present, IH has resided with his mother in the state of Oregon since June 2013 and the last time appellant father chose to exercise the visitation rights granted to him by Benton County Superior Court was August 2016. Additionally the state of Oregon entered an order on October 25, 2016, that set visitation, and appellant father has chosen not to exercise visitation pursuant to that order.

EH has resided with her mother in the state of Oregon since her birth on 4/29/14 and the last time appellant father saw her was when she was four months old. Additionally he has never chosen to exercise visitation rights granted to him by the state of Oregon.

In short, an extension does not represent prejudice to the appellant father in this matter, because, of his own volition, he has decided not to see the same children who, for the most part, are at the center of this appeal.

In sum, for the reasons identified in Paragraph 3 above, as well as those set forth above, an extension of 60-90 days is reasonable under the circumstances.

DATED this 7th day of June, 2017.

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD, LLP

By: _____

EDWARD F. SHEA, JR.
Attorney for Respondent
WSBA 23704

CERTIFICATE OF SERVICE

I certify that on the 7th day of June, 2017, I caused a true and correct copy of this Motion to Extend Time for Filing the Brief of the Respondent to be served on the following in the manner indicated below:

Joanne Comins Rick, Attorney for Petitioner

Via USPS to: PO Box 511

Prosser, WA 99350

Via Facsimile to: (509) 786-1128

Heather McClain

HEATHER MCCLAIN
Legal Assistant to Edward F. Shea, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of August, 2017, I caused to be served a true and correct copy of the foregoing document to the following:

☐ HAND DELIVERY	Joanne Comins Rick
☒ U.S. MAIL	Halstead & Comins Rick, PS
☐ OVERNIGHT DELIVERY	1221 Meade Avenue
☐ FACSIMILE	Prosser, WA 99350
☒ EMAIL	jgcrick@gmail.com

Heather McClain

HEATHER MCCLAIN

KUFFEL, HULTGRENN, KLASHKE, SHEA & ELLERD

August 17, 2017 - 4:17 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	34646-3
Appellate Court Case Title:	Sergio E. Herrera v. Sandra Villaneda
Superior Court Case Number:	15-3-00269-5

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